

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 RING LAY,

12 Plaintiff,

13 vs.

14 MICHAEL J. ASTRUE,
15 Commissioner of Social Security,

16 Defendant.

CASE NO. 07CV1112 JLS (NLS)

**ORDER: (1) ADOPTING REPORT
AND RECOMMENDATION; (2)
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT;
AND (3) GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

17
18 Presently before the Court are Plaintiff's motion for summary judgment [Doc. No. 15],
19 Defendant's cross-motion for summary judgment [Doc. No. 16], Magistrate Judge Stormes' Report
20 and Recommendation ("Report") [Doc. No. 19], and Plaintiff's objections [Doc. No. 20.] For the
21 following reasons, the Court **ADOPTS** Magistrate Judge Stormes' Report and Recommendation,
22 **GRANTS** Defendant's motion for summary judgment, and **DENIES** Plaintiff's motion for summary
23 judgment.
24

25 **BACKGROUND**

26 On November 17, 2004, Plaintiff Ring Lay filed an application for disability benefits under
27 Title II of the Social Security Act. Lay alleged that he became disabled on January 1, 2003 due to
28 diabetes, headaches, dizziness, back pain, and arm pain. [AR at 289-95.] From 1995 to 2003, Lay
worked as a Buddhist monk. [AR at 289.] The Commissioner denied Lay's application both

1 initially and upon reconsideration. [AR at 27-31, 34-39.] Lay requested a hearing before an
2 Administrative Law Judge (“ALJ”), and on April 12, 2006, the ALJ conducted a hearing to
3 consider the merits of Lay’s application. [AR at 40, 286.]

4 The medical evidence before the ALJ showed that Lay received treatment for chronic head
5 pain, low back pain, diabetes, and degenerative discogenic disease of the neck. On March 28,
6 2005, Dr. Elizabeth Locke performed a complete internal medicine examination of Lay and
7 diagnosed hypertension, type II diabetes, and complaints of daily headaches and dizziness. [AR at
8 161.] Dr. Locke noted that during the examination Lay was in no apparent distress and had a
9 normal blood pressure. [AR at 21.] The examination revealed a full range of motion in the
10 shoulders bilaterally with tenderness in the left shoulder with abduction. [Id.] X-rays revealed no
11 significant degenerative changes and no impingement syndrome. [AR at 164.] The results
12 demonstrated a narrowing of disc space and early degenerative disc disease, but were otherwise
13 negative. [Id.] Lay’s neurological and cardiovascular exams showed normal limitations. [AR at
14 21.] Dr. Locke opined that Lay could lift and carry twenty pounds occasionally, and ten pounds
15 frequently, and could stand, walk, or sit for six or more hours during an eight-hour workday. [Id.]
16 Two reviewing state physicians agreed with Dr. Locke’s opinion and found that Lay was not
17 disabled. [AR at 172-75.]

18 On March 28, 2006, another physician, Dr. Minh Nguyen, examined Lay and found that he
19 had one to two headaches per month, but that the headaches had improved and occurred less
20 frequently after medication. [AR at 179.] On April 7, 2006, Dr. Huong Nguyen examined Lay
21 and reported that he had a history of chronic headaches that prevented him from working in an
22 environment with dangerous machinery. [AR at 180.] Dr. Huong Nguyen also completed a
23 functional assessment and found that Lay was limited to sitting and walking for two hours at a
24 time. [Id.]

25 Aside from reviewing the foregoing medical evidence, the ALJ entertained a vocational
26 expert (“VE”) at the hearing. The ALJ presented the VE with various hypotheticals encompassing
27 aspects of Lay’s physical and mental limitations. [AR at 297.] The ALJ asked the VE if Lay
28 could continue to work assuming he suffered the limitations diagnosed by Dr. Locke and the

1 reviewing state physicians. In response, the VE testified that Lay would be able to perform his
2 past work as a Buddhist monk. [AR at 298.] The ALJ also presented a similar hypothetical based
3 on Dr. Huong Nguyen's functional assessment. In response, the VE testified that Lay would be
4 unable to work as a monk. [Id.]

5 After reviewing the medical records and testimony, the ALJ denied Lay's application for
6 disability benefits. [AR at 10-19.] The ALJ found that Lay's impairments, while severe, were not
7 disabling, and that Lay retained the residual functional capacity ("RFC") to perform light level
8 work. [AR at 20-21.] Specifically, the ALJ concluded that Lay could lift/carry twenty pounds
9 occasionally, and ten pounds frequently, and could stand, walk, or sit for six hours in an eight-hour
10 workday. [AR at 21.] In determining the RFC, the ALJ affixed little weight to Dr. Huong
11 Nguyen's evaluation because he found Nguyen's functional assessment inconsistent with the
12 medical evidence. [Id.]

13 The ALJ also found Lay's subjective complaints of pain excessive in relation to the
14 objective medical evidence. The ALJ gave multiple reasons for discrediting Lay's complaints,
15 including the following: (1) on March 28, 2005, Lay reported that a CAT scan had negative
16 results; (2) the medical records revealed that Lay's diabetes and hypertension were reasonably
17 well controlled; (3) Lay had undergone conservative treatment; (4) Lay had not taken any
18 medications that had imposed disabling side effects or medications at dosages commensurate with
19 the alleged levels of pain; (5) no treating or examining physician had opined that Lay was totally
20 and permanently disabled from work; (6) Lay was able to participate in the hearing and respond to
21 questioning without any apparent difficulties; and (7) Lay described daily activities that were not
22 limited to the extent one would expect, given the complaints of disabling symptoms and
23 limitations. [AR at 22.] As a result, the ALJ denied Lay's claims for benefits. [Id.]

24 Lay disagreed with the ALJ's decision and requested an Appeals Council ("AC") review.
25 After reviewing Lay's file and newly submitted evidence, the AC affirmed the ALJ's decision.
26 [AR at 4-7.]

Lay then filed the present action challenging the ALJ's decision to deny benefits. [Doc. No. 1.] On April 4, 2008, Magistrate Judge Stormes issued the Report advising this Court to deny Lay's motion for summary judgment and to grant the Commissioner's cross-motion for summary judgment. [Doc. No. 19.] Judge Stormes found that: (1) substantial evidence supported the ALJ's decision; (2) the ALJ provided clear and convincing reasons for discrediting Lay's subjective complaints; and (3) good cause did not exist to remand for consideration of new evidence. [Report at 7-13.] Lay now objects to the Report, primarily arguing that: (1) the VE's testimony had no evidentiary value because it was based on an incomplete hypothetical; (2) the ALJ erroneously relied on Dr. Locke's testimony; (3) the ALJ did not provide clear and convincing reasons for discrediting Lay's subjective complaints; and (4) good cause exists to remand for consideration of material evidence not reviewed by the ALJ. [Pl.'s Obj. at 2-9.]

LEGAL STANDARD

Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews de novo those portions of the Magistrate's Report to which either side objects. Thomas v. Arn, 474 U.S. 140, 149 (1985); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court has no obligation to review the Magistrate's legal conclusions to which neither party objects. Schmidt v. Johnstone, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003); see also Reyna-Tapia, 328 F.3d at 1121 (holding that "the district judge must review the magistrate judge's findings de novo if objection is made, but not otherwise").

The ALJ's decision to deny benefits will only be disturbed if it is not based on "substantial evidence or if it is based on legal error." Magallanes v. Brown, 881 F.2d 747, 750 (9th Cir. 1989). The substantial evidence inquiry is solely whether the record, read as a whole, contains such evidence as would allow a reasonable mind to accept the ALJ's conclusions. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982); see also Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001) ("substantial evidence is more than a mere scintilla, but may be less than a preponderance"). If the evidence supports more than one interpretation, the Court must uphold the ALJ's decision. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). The ALJ is entitled to draw inferences

1 logically flowing from the evidence. Sample, 694 F.2d at 642.

2 The ALJ uses a five-step analysis to evaluate disability claims. 20 C.F.R. § 404.1520.

3 In step one, the ALJ determines whether a claimant is currently engaged in
 4 substantial gainful activity . . . If not, the ALJ proceeds to step two and evaluates
 5 whether the claimant has a medically severe impairment or combination of
 6 impairments . . . If so, the ALJ proceeds to step three and considers whether the
 7 medical impairment or combinations of impairments meets or equals an impairment
 8 listed under 20 C.F.R. pt. 404, subcpt. P, App. 1. If so, the claimant is
 9 automatically presumed disabled. If not, the ALJ proceeds to step four and assesses
 10 whether the claimant is capable of performing her past relevant work. If so, the
 11 claimant is not disabled. If not, the ALJ proceeds to step five and examines
 12 whether the claimant has the [RFC] to perform any other substantial gainful activity
 13 in the national economy. If so, the claimant is not disabled. If not, the claimant is
 14 disabled. The claimant carries the initial burden of proving a disability in steps one
 15 through four of the analysis. See Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir.
 16 1989). However, if a claimant establishes an inability to continue her past work,
 17 the burden shifts to the Commissioner in step five to show that the claimant can
 18 perform other substantial gainful work. See id.

19 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

20 ANALYSIS

21 I. The Court Finds that Substantial Evidence Supports the ALJ's Findings

22 As mentioned, the plaintiff carries the burden of showing an inability to perform his past
 23 relevant work. Id. The ALJ's decision to deny benefits will only be disturbed if it is not based on
 24 "substantial evidence or if it is based on legal error." Magallanes v. Brown, 881 F.2d 747, 750
 25 (9th Cir. 1989). If the evidence supports more than one interpretation, the Court must uphold the
 26 ALJ's decision. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).

27 Here, the record adequately supports the ALJ's findings. Dr. Elizabeth Locke performed a
 28 complete examination of Lay and opined that Lay could lift and carry twenty pounds occasionally,
 and ten pounds frequently, and could stand, walk, or sit for six hours during an eight-hour
 workday. [AR at 161.] During the examination, Locke noted that Lay was in no apparent distress
 and had normal blood pressure. [AR at 21.] The examination revealed a full range of motion in
 shoulders bilaterally with tenderness in the left shoulder with abduction. [Id.] Lay's neurological
 and cardiovascular exams showed normal limitations. [Id.] In making her diagnosis, Dr. Locke
 referred Lay for X-rays which revealed early degenerative disc disease, but were otherwise
 negative. [AR at 164.] Two state physicians also agreed with Dr. Locke's opinion and found that

1 Lay was not disabled. [AR at 175.] Dr. Minh Nguyen examined Lay and reported that he had one
 2 to two headaches per month, but also stated that the headaches had improved and occurred less
 3 frequently after medication. [AR at 179.]

4 The Court acknowledges that Dr. Huong Nguyen's finding that Lay was limited to sitting
 5 and walking for two hours at a time differs from the foregoing evidence. [AR at 180.] However,
 6 the Court agrees with the ALJ that this functional assessment was not consistent with the medical
 7 records. [AR at 21.] Moreover, even if Dr. Huong Nguyen's opinion supported a finding of
 8 disability, the Court must uphold the ALJ's decision since substantial evidence supported his
 9 decision. Tackett, 180 F.3d at 1097 (9th Cir. 1999).

11 **II. The Court Finds Plaintiff's Multiple Objections Unpersuasive**

12 **A. The ALJ Properly Relied on the VE's Testimony**

13 During the hearing, the VE responded to various hypotheticals. The ALJ first presented a
 14 hypothetical based on the opinions of Dr. Locke and the reviewing state physicians. In response to
 15 this hypothetical, the VE testified that Lay would be able to perform his past work as a Buddhist
 16 monk. [AR at 298.] The ALJ next presented a hypothetical based on Dr. Huong Nguyen's
 17 functional assessment. In response, the VE testified that under such limitations Lay would be
 18 unable to work as a monk. [Id.] Ultimately, the ALJ relied upon the hypothetical that
 19 encompassed Dr. Locke's diagnosis even though it conflicted with Dr. Nguyen's assessment. [Id.]
 20 Lay argues that the VE's response to the first hypothetical had no evidentiary value because the
 21 hypothetical was based on a disputed diagnosis.

22 A hypothetical may be based on a diagnosis which is disputed, but the diagnosis must be
 23 supported by evidence in the record. Sample v. Schweiker, 694 F.2d 639, 643-44 (9th Cir. 1982).
 24 Here, two state physicians independently supported Dr. Locke's conclusion that Lay could lift
 25 twenty pounds occasionally, ten pounds frequently, and could stand, walk, or sit for six hours
 26 during an eight-hour workday. [AR at 161,167-73.] Therefore, the Court finds that the ALJ
 27 properly relied on the VE's response to the hypothetical based on Dr. Locke's diagnosis.

1 Lay also argues that the ALJ was not free to ignore the hypothetical that encompassed Dr.
 2 Huong Nguyen's opinion. However, the ALJ is not bound to accept hypotheticals that are
 3 unsupported by substantial evidence. See Magallanes v. Brown, 881 F.2d 747, 756-57 (9th Cir.
 4 1989). Further, the ALJ may reject opinions of examining physicians where there are conflicting
 5 opinions and if the ALJ provides specific legitimate reasons. Thomas v. Barnhart, 278 F.3d 947,
 6 957 (9th Cir. 2002); see also 20 C.F.R. 416.927(d)(2-4) (the ALJ should give greater weight to
 7 opinions consistent with the record).

8 Here, the ALJ specifically noted the inconsistency between Dr. Huong Nguyen's
 9 evaluation and the medical records. [AR at 21.] The ALJ determined that the medical evidence
 10 and two state reviewing physicians supported Dr. Locke's diagnosis. Since substantial evidence
 11 did not support Dr. Huong Nguyen's assessment, the ALJ appropriately gave greater weight to the
 12 opinions of Dr. Locke and the state reviewing physicians. Thus, the Court finds that the ALJ
 13 properly exercised his discretion when he relied on the VE's testimony.

14 15 **B. The ALJ Did Not Err by Relying on Dr. Locke's Report**

16 Lay also argues that Dr. Locke's reports should have been discounted since she did not
 17 have the results of several other tests. The Court disagrees.

18 The ALJ must consider all of the evidence on record. 20 C.F.R. § 404.1527. However,
 19 when the record is contradictory, the conflict is for the ALJ to resolve. Vincent v. Heckler, 739
 20 F.2d 1393, 1395 (9th Cir. 1984). Further, as mentioned, the ALJ should give greater weight to
 21 opinions consistent with the record. See 20 C.F.R. 416.927(d)(2-4).

22 The record reflects that the ALJ did consider all of the evidence placed before him and
 23 concluded that the medical evidence supported Dr. Locke's opinion. [AR at 23.] The fact that Dr.
 24 Locke may not have had the 2005 CAT scan or the 1998 X-ray does not significantly undermine
 25 her complete examination. The state reviewing physicians, the 2005 X-rays, and the medical
 26 record as a whole support Dr. Locke's evaluation. Therefore, the ALJ did not err by deferring to
 27 Dr. Locke's evaluation.

C. The ALJ's Rejection of Lay's Complaints Meets the Clear and Convincing Standard

Lay contends that the ALJ's reasons for rejecting his subjective complaints do not meet the clear and convincing standard. The Court disagrees.

The ALJ's reasons for rejecting a plaintiff's testimony must be clear and convincing. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). In order to meet the clear and convincing standard, the ALJ must specifically state what facts in the record discredited the plaintiff's testimony. Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). This assures the reviewing court that the ALJ did not arbitrarily dismiss the plaintiff's testimony. Bunnell v. Sullivan, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc).

As discussed above, the ALJ listed multiple reasons to support his rejection of Lay's complaints. [AR at 22.] The ALJ specifically stated that no treating or examining physician had opined that Lay was totally and permanently disabled and that three independent physicians had found Lay able to continue light work. [Id.] The ALJ also noted that Lay's treatment records demonstrated that his diabetes and hypertension were reasonably controlled. [Id.] In addition, the ALJ recognized that Lay's own description of his daily activities belied his claim that he was totally unable to work at a light level of exertion. [Id.] In sum, the ALJ's reasons for his credibility determination were clear and convincing.

D. Lay Has Failed to Demonstrate That This Court Should Remand for Consideration of New Evidence.

Lay contends that this case should be remanded for consideration of new evidence under 42 U.S.C. § 405(g). The new evidence consists of: (1) evidence obtained after the hearing, including a 2006 MRI, Dr. Nguyen's interpretation of the 2006 MRI, and separate reports by Drs. Lessner, Henderson, and Grisola; and (2) evidence available before the hearing, including the results of a 2005 CAT scan.

For this court to order a remand, Lay must show that the new evidence "is *material* and that there is *good cause* for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). To establish materiality, a plaintiff must show that the evidence bears directly and substantially on the matter in dispute and that there is a reasonable possibility

1 that the new evidence would have changed the outcome of the ALJ's determination had it been
 2 before him. Mayes v. Massanari, 276 F.3d 453, 462 (9th Cir. 2001); Booz v. Secretary of Health
 3 and Human Serv., 734 F.2d 1378, 1381 (9th Cir. 1983).

4 To establish good cause, Lay must show that the new evidence was previously unavailable.
 5 Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985); Clem v. Sullivan, 894 F.2d 328, 332 (9th
 6 Cir. 1990). A claimant does not meet the good cause requirement by merely obtaining a more
 7 favorable report once his or her claim has been denied. Mayes, 276 F.3d at 463; see also Allen v.
 8 Secretary of Health and Human Services, 726 F.2d 1470, 1473 (9th Cir. 1984) (stating that the
 9 good cause requirement would be meaningless if a claimant were allowed to introduce new
 10 evidence simply by obtaining a new opinion after a hearing). In order to introduce new reports, a
 11 claimant must adequately explain why he or she did not seek the reports prior to the ALJ's
 12 hearing. Mayes, 276 F.3d at 463.

13 **1. Evidence Obtained After the Hearing**

14 Lay argues that because the 2006 MRI, its interpretation by Dr. Nguyen, and the separate
 15 reports by Drs. Lessner, Henderson and Grisolia only became available after the ALJ's hearing,
 16 good cause exists. However, Lay does not explain why he did not seek these evaluations prior to
 17 the hearing, aside from his reference to obtaining new counsel. Lay was aware of his problems
 18 and had already been evaluated several times. Therefore, the Court finds that Lay has failed to
 19 satisfy the good cause requirement.

20 Further, even assuming good cause, Lay has failed to demonstrate the materiality of these
 21 new evaluations. Although the 2006 MRI was not available during the ALJ's hearing, the Appeals
 22 Council considered the 2006 MRI and Dr. Nguyen's interpretation. [AR at 8, 182 (stating that the
 23 AC reviewed the July 22, 2006 letter which included the MRI results and Nguyen's analysis).]
 24 The AC concluded that this new evidence was consistent with the ALJ's conclusion that Lay was
 25 asymptomatic and capable of performing the duties of a Buddhist monk. [AR at 5.] The AC also
 26 considered Dr. Henderson's reports and found that it did not shift the weight of the evidence. [Id.]
 27 As a result, there is no reason to believe that remanding holds a "reasonable possibility" of
 28 changing the outcome of the ALJ's determination. Booz, 734 F.2d at 1381.

1 **2. Evidence Obtained Before the Hearing**

2 To establish good cause, a plaintiff must demonstrate that the new evidence was previously
3 unavailable. Key v. Heckler, 754 F. 2d 1545, 1551 (9th Cir. 1985). Here, Lay cannot establish
4 good cause because he had the opportunity to present the 2005 CAT scan results during the
5 hearing.

6 In addition, the Court finds that the CAT scan results are not material. The CAT scan
7 results state that any abnormalities are “commonly seen and are of doubtful clinical significance.”
8 [Pl.’s Obj. at 3.] Furthermore, substantial evidence supports the ALJ’s denial, including the
9 conclusions of Dr. Locke, the VE, and the reviewing state physicians. [AR at 21-23.] Therefore,
10 the Court finds that the CAT scan results do not hold a reasonable possibility of changing the
11 outcome of the hearing.

12
13 **CONCLUSION**

14 For the foregoing reasons, the Court **ADOPTS** Magistrate Judge Stormes’ Report and
15 Recommendation, **GRANTS** Defendant’s motion for summary judgment, and **DENIES** Plaintiff’s
16 motion for summary judgment.

17
18
19 DATED: July 22, 2008

20 *Janis L. Sammartino*
21 _____
22 Honorable Janis L. Sammartino
23 United States District Judge
24
25
26
27
28